TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

IN THE

Supreme Court of the United States

October Term, 1972

No. 71-830

TRANS WORLD AIRLINES, INC.,
Cross-Petitioner,

v.

HUGHES TOOL COMPANY and
RAYMOND M. HOLLIDAY,
Cross-Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR CROSS-RESPONDENTS HUGHES TOOL COMPANY AND RAYMOND M. HOLLIDAY

Statement of the Case

The Statement of the Case in the Brief for Cross-Petitioner gives an adequate account of the circumstances that raise the issues tendered on the cross-petition, but the cross-respondents, Toolco and Holliday, do not accept conclusory statements set out there that are unnecessary to consideration of the issues thus raised. In particular, Toolco and Holliday do not agree that it is "now undisputed that TWA suffered losses of at least $45,870,478.65 from the specific injuries alleged in the complaint" (Cross-Petitioner's Brief 7-8) or similar statements suggesting

an admission that defendants are liable to TWA or that acts of defendants caused damage in any amount to TWA.[1] The question of liability is discussed throughout defendants' brief in No. 71-827 and the damages claimed are vigorously disputed at pp. 117-145 of that brief.

Summary of Argument

I. The general federal rule is that interest is not allowed upon unliquidated damages but that the court has discretion to "include interest or its equivalent" if this is necessary to arrive at "fair compensation." *Miller* v. *Robertson*, 266 U.S. 243, 258 (1924). At best TWA's claim for prejudgment interest, measured either from the date of the wrong or from the filing of the master's report, would have been addressed to the discretion of the trier of fact, and this case, in which the damages awarded are an arbitrary sum based on imaginative assumptions, would not be an appealing one for the exercise of discretion. But the usual discretion does not apply in a case, like this one, in which the statute provides treble damages as a penalty. An award of double or treble damages gives the plaintiff more than ample recovery for the delay in payment of sums due, *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697 (1945), and, unless a statute expressly provides to the contrary—

[1] The suggestion in note 2 at p. 8 of Cross-Petitioner's Brief that Toolco asserted in its counterclaims that TWA had suffered losses of this magnitude from late deliveries of jets and borrowings at too high interest rates is unfounded. The counterclaim alleged a conspiracy by the lending institutions and others to seize control of TWA for their own purposes and stated that in furtherance of that conspiracy TWA was forced to order more jets than it needed or could afford (Answer ¶ 97(e), App. A-88). A claim that TWA has been injured by ordering too many jets is not an admission that it was injured by having too few jets.

which is not the case here—interest prior to judgment cannot be had on a statutory penalty. *Rodgers* v. *United States*, 332 U.S. 371 (1947).

II. The finding of the Special Master of the interest rate at which TWA could have borrowed capital to acquire jet aircraft has been accepted by the District Court and the Court of Appeals and presents no issue for this Court. TWA claims that it could have acquired the capital at an earlier time and a lower rate, but its evidence offered in support of this contention was specifically rejected by the Special Master, and there is no allegation in the complaint that would have required the Master to make a finding more favorable to TWA.

III. TWA's claim that the authorization in § 4 of the Clayton Act for recovery of "cost of suit" is not limited to taxable costs but allows recovery of expenses incurred for experts has been rejected in a long and uniform line of circuit and district court decisions stemming from *Straus* v. *Victor Talking Machine Co.*, 297 F. 791 (2d Cir. 1924). TWA's construction of the statute would make the further provision for "a reasonable attorney's fee" surplusage, since if "cost of suit" includes a plaintiff's full expenses it necessarily must include his attorney's fee. The main burden of TWA's argument on this point is that the nature of litigation has changed and that this Court should broaden the category of things recoverable as "cost of suit" in order to take account of this. Rewriting statutes is a task entrusted to Congress and not to this Court.

Argument

The issues raised in No. 71-830 are, as TWA admitted in its cross-petition, "peripheral to the basic controversy" (Cross Petition 24). If Toolco and Holliday are successful on the merits in No. 71-827, the issues raised in No. 71-830 pass out of the case. Even if Toolco and Holliday should be unsuccessful on every other issue presented in No. 71-827, there will be no need to consider the issues posed on the cross-petition unless defendants' position on the effect of the *ad damnum*, set out at pp. 52-65 of our brief in 71-827, is rejected in its entirety.

TWA originally prayed for recovery of $105 million together with costs and attorneys' fees (App. A-31). After defendants had refused to proceed further in the case, TWA was permitted to amend to increase the *ad damnum* from $105 million to $135 million (32 F.R.D. at 607, App. A-321). The judgment actually entered, exclusive of attorneys' fees and costs, was for $137,611,435.95 (App. A-2073). Thus TWA, which has already been awarded some $2.6 million more than even its amended *ad damnum* prayed for, now asks on its cross-petition that it be awarded an additional $75,994,596.06. If Rule 54(c) means even remotely what it says, the cross-petition can be disposed of on the basis of that rule without more.

I. The Courts Below Correctly Refused to Allow Interest Prior to Judgment in this Treble Damage Action.

"Interest" is used in two different senses with regard to judgments and these should be clearly differentiated. When a money judgment is entered it is for a stated sum with interest on that sum at a specified rate. See Official Forms 31, 32, Federal Rules of Civil Procedure. In some cases the

judgment itself may include, as a part of the damages, interest for part or all of the time from the occurrence of the wrong until the entry of judgment. The latter is commonly referred to as "moratory interest."

In federal court, there is a statutory right to interest on any money judgment in a civil case. This interest is calculated from the date of the entry of the judgment at the rate allowed by state law. 28 U.S.C. § 1961. There is no issue here about interest of this kind. The judgment of the District Court provided for it, the Court of Appeals increased the rate at which it is payable, and already the interest on this judgment, which is running at a rate of roughly $30,000 a day, has increased the size of the judgment by some $24 million over the principal sum awarded to TWA.

TWA now contends that, as a part of its damages, it should have been given interest from the date of the wrong, or, when trebled, additional damages of $38.9 million. Alternatively it claims that it should have had interest from the date of the master's report, rather than from the entry of judgment, or an additional $15.9 million. Neither claim is tenable.

In an action on a federal statute, such as the present one, whether to include moratory interest as a part of the damages is wholly a question of federal law. *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697, 715 (1945); *Board of Commissioners of Jackson County* v. *United States*, 308 U.S. 343, 349-350 (1939). TWA cites four cases in support of its statement that "[a]t the time the Clayton Act was passed, the general federal rule, permitting the award of interest on a sum found due (even though unliquidated) from the time a plaintiff should have had the sum as an

element of his actual damages, was already well established" (Cross-Petitioner's Brief 17). As the cases it cites show, that statement is misleading if not, indeed, incorrect. The rule that damages included interest applied only if the amount in question was either liquidated or "clearly ascertainable." Thus in *Eddy* v. *Lafayette*, 163 U.S. 456, 467 (1896), this Court held that it was error to charge the jury that interest was to be included in an award of damages, but found the error harmless because the jury had not awarded the plaintiff interest. *New Dunderberg Mining Co.* v. *Old*, 97 F. 150, 153-155 (8th Cir. 1899), held that interest could be awarded on a claim that was unliquidated but was "clear, definite, and exact." *Brent* v. *Thornton*, 106 F. 35, 38 (5th Cir. 1901), held that it was error to charge a jury to add interest to plaintiff's damages, saying that the award of interest was discretionary. *Lincoln* v. *Claflin*, 7 *Wall.* (74 U.S.) 132, 139 (1868), held that a charge requiring the jury to allow interest in a tort case was erroneous but affirmed because defendant had not objected to the charge.

The most that could be said of the federal cases at the time that the Clayton Act was passed was that interest was *not* generally regarded as an element of damages in tort cases for unliquidated damages though in appropriate cases it might be awarded at the discretion of the finder of fact. This is still the law. The statement most often quoted in subseqent cases is that of Justice Butler for the Court in *Miller* v. *Robertson*, 266 U.S. 243, 258 (1924):

> Generally, interest is not allowed upon unliquidated damages. * * * But when necessary in order to arrive at fair compensation, the court in the exercise of a sound discretion may include interest or its equivalent as an element of damages.

TWA rightly turns to a truly distinguished authority, the late Charles T. McCormick, for his statement that there is a tendency toward the allowance of interest in cases for unliquidated damages (Cross-Petitioner's Brief 15), but it neglects to include the next sentence, following the portion that it quotes, in which Dean McCormick said that "the courts have in the main gone only so far as to permit the jury (or the judge where he is sitting without jury) to grant interest in their discretion, in cases of this type." McCormick, *Damages* § 56, at 222 (1935).

Wholly aside from the fact that TWA was awarded a huge penalty by virtue of the treble damage provisions of the statute, this would have been an inappropriate case for the finder of fact to exercise his discretion in favor of allowing interest on TWA's unliquidated claim. This is not a case in which a plaintiff has suffered an identifiable loss from an identified restraint—as it might have been, for example, if a price-fixing conspiracy had required TWA to pay a million dollars per plane more than it should have. As is more fully developed in Point VI of our main brief (Petitioners' Brief 117-145), the damages here assessed were wholly speculative, with regard both to their amount and to their causal relation to any supposed antitrust violation by defendants. At the damage hearing TWA stated how many planes it thought it should have had and compared that with the number of planes it actually had. Damages were then computed on the bold assumption that it could have sold seats in additional planes to the same extent as it did in the planes it actually had. All of this was done without any showing that, absent a restraint of trade, TWA would have or could have acquired 47 jets or 63 jets or any other number of jets. Since the entire damage proof was based on imaginative assumptions about what

might have happened, a trier of fact would hardly be inclined to exercise its discretion in favor of allowing interest on the purely arbitrary sum thus computed.

But whatever discretion the trier of fact might ordinarily have had, this case is different because the statute does provide for treble damages. In *Miller* v. *Robertson*, 266 U.S. 243, 258 (1924), a discretion was recognized to "include interest or its equivalent" when necessary to arrive at "fair compensation." A plaintiff who has received treble damages has already received far more than fair compensation. The trebling of damages gives him far more than the "equivalent" of interest. As the District Court said in the present case, "[t]reble damages compensate a plaintiff handsomely for all his losses, including loss of the use of money rightfully his" (308 F. Supp. at 696, App. A-2059). That ruling was in accord with the general rule that interest cannot be recovered on a penalty nor where double or treble damages are allowed by statute.[2] That principle has specific application to antitrust cases.[3]

To rebut this rule, and to attempt to establish a right to recover interest in a treble damage action, TWA is able to produce only two early and inconclusive decisions (Cross-Petitioner's Brief 18-19). In *Thomsen* v. *Cayser*, 243 U.S. 66 (1917), the jury had added interest to the damages sustained by the plaintiff in an antitrust case. Although this

---

[2] 1 Sedgwick, *Damages* § 655 (5th ed. Sedgwick & Beale 1913); *Rayonier, Inc.* v. *Polson*, 400 F.2d 909, 922 (9th Cir. 1968); *United States* v. *Globe Remodeling Co., Inc.*, 196 F.Supp. 652, 658 (D. Vt. 1960); see *United States* v. *United Drill & Tool Corp.*, 183 F.2d 998, 1000 (D.C. Cir. 1950); cf. *Carter Products, Inc.* v. *Colgate-Palmolive Co.*, 214 F.Supp. 383, 418 (D. Md. 1963).

[3] *Locklin* v. *Day-Glo Color Corp.*, 429 F.2d 873, 877 (7th Cir. 1970), *cert. denied*, 400 U.S. 1020 (1971); *Cape Cod Food Products, Inc.* v. *National Cranberry Assn.*, 119 F.Supp. 900, 911 (D. Mass. 1954).

Court mentioned that fact, 243 U.S. at 89, the inclusion of interest was not one of the issues in dispute and this Court did not pass on its propriety.[4] In *United Mine Workers* v. *Coronado Coal Co.*, 258 F. 829, 846-847 (8th Cir. 1919), *reversed on other grounds*, 259 U.S. 344 (1922), it was held to be error for the court to add interest to a jury's award of damages in an antitrust case, on the ground that interest in tort actions is a matter for the discretion of the jury. Whatever authority these decisions might have on this point has been dissipated by intervening decisions from this Court.

In *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697 (1945), one of the issues was whether an employee recovering double damages under § 16(b) of the Fair Labor Standards Act, 29 U.S.C. § 216(b), was also entitled to interest on the sums so recovered. The Court held unanimously that he was not. Since Congress has provided double damages as compensation for delay in payment of sums due, interest would be a second compensation for the same delay and could not be allowed. 324 U.S. at 714-716.

The issue in *Rodgers* v. *United States*, 332 U.S. 371 (1947), was whether interest could be awarded on statutory penalties for exceeding cotton allotments. The Court held that it could not. It said that penalties are intended to have a deterrent effect and are similar to a criminal fine.

---

[4] TWA quite properly does not cite *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968). Although the Court there said that the judgment "awarded trebled damages, including interest," 392 U.S. at 483, it was misled by an inept choice of language by the District Court. When that court spoke of the "interest to be included in the damage calculations" it was describing a sum that was deducted from the damages because it represented interest costs that the plaintiff would have incurred. 245 F.Supp. at 302. Examination of the briefs and records in that case in this Court confirms that no prejudgment interest was allowed to the plaintiff.

"We are unable to say that it would be consistent with the congressional purpose for the courts to add interest to these very substantial penalties already imposed upon non-cooperating farmers." 332 U.S. at 376. The Court also cited 1 Sutherland, *Damages* § 330 (4th ed. Berryman, 1916), for the proposition that interest cannot be recovered on statutory penalties. 332 U.S. at 376 n. 7.

As the Court of Appeals pointed out, "trebled damages will more than adequately compensate TWA for its injuries" (449 F.2d at 80, App. A-2795). Thus the rationale of the *Brooklyn Savings* case precludes interest. The provision for treble damages in antitrust actions is "in the nature of a penalty for the public wrong * * *." *Rogers* v. *Douglas Tobacco Board of Trade*, 244 F.2d 471, 483 (5th Cir. 1957). Since the remedy is "penal in nature and susceptible therefore to all restrictions surrounding an action of such nature," *Sun Theatre Corp.* v. *RKO Radio Pictures*, 213 F.2d 284, 287 (7th Cir. 1954), prejudgment interest is foreclosed also on the rationale of *Rodgers* v. *United States*.[5]

---

[5] The Court of Appeals made the further point that to allow moratory interest would present "difficult questions of proof—including highly abstruse inquiries as to proper rates and the time from which interest should run. Since the trebled damage device in any event adequately serves the penal and remedial purposes of the antitrust laws, we believe it is sounder, absent contrary express Congressional intent, to consider that these difficult and time-consuming inquiries are intended to be avoided." [449 F.2d at 80, App. A-2795.]

To this TWA offers an interesting plea of confession and avoidance. Without denying that inclusion of interest would lead to the kinds of problems foreseen by the Court of Appeals, TWA says that it is prepared to avoid them by accepting a computation from the latest possible date and at the lowest arguably compensatory figure (Cross-Petitioner's Brief 21-22). It is easy enough for a plaintiff with an already immense judgment generously to forbear from asking more than a minimal $38.9 million extra on this account. But if—contrary to the authorities we have discussed—there is a statutory right to interest from the time of the wrong, the extent of that right cannot be cut back by the forbearance of a particular lavishly-endowed plaintiff and future cases would present precisely the abstruse inquiries that the Second Circuit thought difficult and unnecessary.

If, as we have seen, the fact that this is a treble damage action bars an award of interest from the time of the wrong as damages, it equally bars a claim for interest from the date of the master's report. The cases relied on by TWA in which interest has been allowed from the date of the master's report (Cross-Petitioner's Brief 24-25) have done so on the theory that this interest was a part of the damages.[6] They stem from a time when interest was ordinarily refused on unliquidated claims and they held that the claim became liquidated, and interest ran as part of the damages, from the date of the master's report. Congress has changed the rule in patent cases and has provided by statute for interest from the date of infringement. See Cross-Petitioner's Brief 25 n. 12. Since the cases denying moratory interest in antitrust cases do not deny interest because the damages are unliquidated, but rather because treble damages are in lieu of interest, the patent cases are not in point.[7]

---

[6] This point was clearly recognized by the Second Circuit:

Tilghman v. Proctor, 125 U.S. 136, 8 S.Ct. 894, 31 L. Ed. 664 (1888), and other patent cases relied on by TWA do not involve the question of when interest begins to run on a judgment, but rather from when interest as an element of damages should be measured. The holding of the cases cited is that interest should run from the date that the fact and amount of damages cease to be "in earnest controversy and of uncertain issue . . ." at [illegible] 8 S. Ct. at 907, an event marked by the filing of the Master's report. Since we determine that moratory interest is inappropriate here, these cases are inapposite.

v. Wm. Wrigley, Jr. [illegible] trademark and unfair competition [illegible] also the time from which interest should be computed on an element of damages." *Id.* at 85[illegible] Colgate-Palmolive Co. [illegible] [449 F.2d at 80 n. 5.

[7] Despite the contrary suggestion [illegible] Brief 26 n. 13), no difference [illegible] *Gage & Valve Co.* [illegible] 441 (1891). It too rests on the distinction between liquidated and unliquidated damages [illegible] distinction that is in issue here.

Interest from the date of the master's report cannot be recovered as damages because this is a treble damage action. It cannot be recovered as interest on a judgment because the statute, 28 U.S.C. § 1961, allows interest of that kind only from "the date of the entry of the judgment," and the judgment is not the master's report but rather the document signed by the court on April 14, 1970 (App. A-2073). See Civil Rule 58.

II. The Determination Below of the Cost of Capital Was Proper.

The Special Master deducted $29 million in computing TWA's supposed "damages" to represent the cost TWA would have incurred to borrow the capital necessary to acquire more jets, to acquire them earlier, and to buy them rather than lease them. TWA concedes the logic and propriety of such a deduction (Cross-Petitioner's Brief 30), as it must in view of *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 504 (1968). TWA accepts also the Master's determination that the rates he used in this computation, 6% and 6.3%, are the rates that TWA would have had to pay in 1958-1960, the years in which it would have been acquiring the planes (Cross-Petitioner's Brief 33). Nevertheless TWA says that it should receive an additional $19.5 million in damages because it could have acquired the needed funds in 1955 and 1956 at a rate of at most 4¾%.

At the damage hearing TWA undertook to show through its financial expert, Edward J. Morehouse of Drexel Harriman Ripley, that an independent TWA would have arranged financing for a jet fleet earlier and on more advantageous terms. Morehouse's testimony was that an

independent TWA would have sold a substantial amount of common stock in May 1955 and that it would then have been able to borrow money between October 1955 and May 1959 at rates ranging from 4% to 6% (App. AX-353-354). As is discussed more fully in our principal brief (Petitioner's Brief 139-141), this testimony about financing was positively and explicitly rejected by the Special Master (App. A-1966 Brownell Report 256-263).

Since TWA's only evidence of what it might have done failed, the Special Master had no choice but to make his own calculation of the cost of capital. As he said: "Since I have not accepted the Drexel Harriman Ripley financial plan (see pages 257-264) on which the Price Waterhouse computation relied, I have independently calculated the appropriate cost of interest" (App. A-1966 Brownell Report 148). His finding that an independent TWA would have paid 6% and 6.3% to finance jets was expressly accepted by the District Court (308 F.Supp. at 694, App. A-2055) and by the Court of Appeals (449 F.2d at 79-80, App. A-2793-2794). The Court of Appeals said:

> In the absence of a viable alternative offered by TWA (and TWA does not contest the rejection of the Morehouse and Comparative Profits studies) the Master properly based his deduction for interest charges on the price of money at the time when financing would normally have been arranged for the 63-jet fleet. [449 F.2d at 79-80, App. A-2794.][8]

[8] TWA reproduces once more (Cross-Petitioner's Brief 33-34) its Exhibit 314, showing weighted average interest rates it and its competitors had in particular years. As the Court of Appeals pointed out, that exhibit is "without regard to the times that the debts were incurred or the purposes for which they were incurred * * *" (449 F. 2d at 79, App. A-2794), and is not a measure of the interest rate TWA or any other airline would have had to pay in any of the years from 1955 through 1960.

Finally TWA says that the fact that it would have paid 4 to 4¾% is "established by the complaint * * *" (Cross-Petitioner's Brief 33). Even read in a vacuum the complaint "establishes" no such thing. The only relevant allegation is the second sentence of ¶ 27 of the complaint, where it is alleged that: "In 1955 and 1956 various United States air carriers were able to obtain funds at a cost (or interest rate per annum) in 1955 of 4% and in 1956 at costs ranging from 4¼% to 4¾%" (App. A-16). This does not say that TWA would have been able to obtain funds at those rates nor does it speak to the size of the loans that were made at those rates. The Special Master found that "a $150-$170 million loan to TWA on October 1, 1955, [as hypothesized in the rejected testimony of TWA's financial expert] would have been almost three times as large as any long-term commitment that had been made to that date to any airline for any purpose" (App. A-1966 Brownell Report 183). Since the Special Master rejected TWA's evidence that it would have arranged long-term financing beginning in 1955—and this testimony itself would have produced an average rate on borrowing in excess of that alleged in the complaint—he quite properly refused to make a finding even more favorable to TWA on the basis of a single sentence in the complaint that says nothing about how much TWA would have had to pay for sums of this magnitude.

III. TWA Was Properly Denied Recovery for the Expenses It Incurred for Experts.

Section 4 of the Clayton Act provides that a successful plaintiff shall recover treble damages "and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15. TWA now claims that it should have received an

additional $1.6 million, as a part of "the cost of suit," as reimbursement for the expenses it incurred for experts. The leading case on this point is *Straus* v. *Victor Talking Machine Co.*, 297 F. 791 (2d Cir. 1924). The court there rejected a claim for sums spent for stenographer's minutes, saying:

> These expenditures were not taxed, as not being "costs of suit." It will be noted that under section 7 of the Sherman Act the words used are "the *costs* of suit," while under section 4 of the Clayton Act the words used are "the *cost* of suit." No explanation is found in the report of any congressional committee for the use of the singular "cost" in the Clayton Act, instead of the plural "costs" in the Sherman Act. We do not regard this difference as significant, for, in our view, if it had been intended that "cost of suit" should mean anything different from "costs of suit," that intention would, in some manner, have been made clear. Each of these phrases is followed by the words "including a reasonable attorney's fee," and this we think makes clear that the difference between "cost" and "costs" in these statutes is probably merely accidental, because if, under the Clayton Act, it had been intended to include the expenses "of suit," there would hardly seem to be any reason for adding the words "including a reasonable attorney's fee," in view of the fact that an attorney's fee would necessarily be a part of the expense incurred in conducting such a litigation. [297 F. at 806-807; emphasis in original.]

TWA cites no case to the contrary. Indeed when it was seeking review here it conceded that the *Straus* case has been followed in "a long and uniform line of circuit and district court decisions * * *" (Cross-Petition 20). That

concession was well justified. Courts have refused to allow claims for reimbursement for a variety of expenses beyond taxable costs in antitrust suits.[9]

TWA's argument on this point is supported, as it concedes, by no direct authority. It cites *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968), for the proposition that "provisions allowing recovery of the expense of suit" are to be liberally construed. The case will not support the reading TWA gives it. *Newman* involved allowance of attorneys' fees in a class action under the 1964 Civil Rights Act. In holding that attorneys' fees should ordinarily be awarded a successful plaintiff in those actions, the court noted that the statute in question did not provide for damages so that allowance of attorneys' fees was necessary in order to avoid hardship to litigants. The case speaks only of attorneys' fees and says nothing about recovery of "expense of suit" other than attorneys' fees.

TWA makes the following argument, each part contingent upon the other: (1) taxable "costs" never include an attorney's fee; (2) the statute speaks of "cost of suit," including a reasonable attorney's fee; (3) therefore "cost of suit" must refer to something more than taxable "costs" (Cross-Petitioner's Brief 41-42). The argument fails with its major premise. The rule is not that attorneys' fees are *never* recoverable as costs, but only that they are not *ordinarily* recoverable as costs.

---

[9] See, *e.g.*, *Twentieth Century Fox Film Corp.* v. *Goldwyn*, 328 F.2d 190, 224 (9th Cir. 1964) (accounting fees); *Farmington Dowel Products Co.* v. *Forster Mfg. Co.*, 297 F.Supp. 924, 930 (D. Maine 1969) (long distance calls; travel expenses; cost of experts); *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 245 F.Supp. 258, 305 (M.D.Pa. 1965) (travel expenses); *Brookside Theatre Corp.* v. *Twentieth Century Fox-Film Corp.*, 11 F.R.D. 259, 265 (W.D.Mo. 1951) (long distance calls).

> While the general American rule is that attorneys' fees are not ordinarily recoverable as costs, both the courts and Congress have developed exceptions to this rule for situations in which overriding considerations indicate the need for such a recovery. [*Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 391-392 (1970).]

See, *e.g.*, 42 U.S.C. § 2000a-3(b), providing that in certain civil rights cases the court may allow the prevailing party "a reasonable attorney's fee as part of the costs * * *."

The statute as it stands, and as it has been uniformly construed for nearly half a century, is a coherent provision specifying that antitrust actions are among the exceptional cases in which Congress has determined that an attorney's fee is to be included in the taxable costs. The construction advanced by TWA would make the reference to an attorney's fee surplusage, since the expense of conducting a suit, which TWA would interpret "cost" to mean, would always include attorneys' fees.

The real thrust of TWA's argument is not that Congress in 1914 authorized the recovery of the fees of experts—or the variety of other kinds of expenses that antitrust plaintiffs have claimed—but that this Court should rewrite the statute to conform to changing realities of litigation. Thus TWA says that proving damages in a major antitrust case "has become" complex and costly (Cross-Petitioner's Brief 35). The Court is invited to interpret the statute "in light of the realities of today's private antitrust suit" (Cross-Petitioner's Brief 38), and to "give recognition to the present-day importance of such expert witnesses in private antitrust suits * * *" (Cross-Petitioner's Brief 39). Whether the statute requires revision so that a successful plaintiff, who will already have been awarded three times

the damage he has suffered, should also be reimbursed by defendant for the full expense he has incurred in prosecuting the suit, is a question of policy appropriately addressed to the Congress rather than to this Court.

CONCLUSION

On the issues raised by the cross-petition, the judgment of the courts below should be affirmed if the positions advanced by petitioners in No. 71-827 are rejected. If the positions advanced in that case are accepted, however, the Court need not reach the issues raised by the cross-petition.

Respectfully submitted,

CHARLES ALAN WRIGHT
2500 Red River
Austin, Texas 78705

CLARK M. CLIFFORD
THOMAS D. FINNEY, JR.
CLIFFORD, WARNKE, GLASS,
MCILWAIN & FINNEY
815 Connecticut Avenue, N.W.
Washington, D.C. 20006

E. BARRETT PRETTYMAN, JR.
HOGAN & HARTSON
815 Connecticut Avenue, N.W.
Washington, D.C. 20006

CHESTER C. DAVIS
MAXWELL E. COX
DAVIS & COX
120 Broadway
New York, New York 10005

Attorneys for Cross-Respondents